U.S. Department of Labor

Office of Administrative Law Judges
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Issue date: 14Nov2002

CASE NO.: 2002-BLA-74

In the Matter of:

JESSE G. TOWNSEND
Claimant,

v.

LADY H. COAL CO., INC.
Employer

and

WV CWP FUND
Carrier

and

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS,
Party-in-Interest

DECISION AND ORDER- AWARDING BENEFITS

This proceeding arises from a third claim for benefits filed on November 19, 1999, under the Black Lung Benefits Act *as amended*, is codified at 30 U.S.C. §901 with its implementing regulations found at Title 20 of the Code of Federal Regulations (herein after the "Act") (DX 1)[1]. Both prior claims were denied.[2]

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[1] The following abbreviations are used in this decision: DX - Director's Exhibit; CX - Claimant's Exhibit; EX - Employer's Exhibit; Tr - hearing transcript; BCR - Board Certified Radiologist; and B - B-reader.)

[2] The District Director of the Department of Labor stated that the first claim was denied because Claimant had failed to prove that his pneumoconiosis was caused by coal mine work and that he was totally disabled (DX 27-22). Claimant's second claim was denied by the Office of Workers' Compensation Programs and the Office of the Administrative Law Judges because

On November 19, 1999, a third application for benefits was filed by Mr. Jesse G. Townsend (hereinafter the "Claimant") (DX 1). The Office of Workers' Compensation Program, Division of Coal Mine Workers' Compensation (hereinafter the "OWCP") sent a Notice of Claim, dated December 10, 1999, to Employer and Employer's insurer, the West Virginia Coal Workers' Pneumoconiosis Fund (hereinafter the "Fund") (DX 6). Thereafter, the OWCP denied the claim on January 19, 2000, and sent a copy of the denial to Employer and the Fund (DX 1, 9). However, the OWCP subsequently issued a Notice of Initial Finding dated, July 24, 2000, which stated that Claimant was entitled to benefits (DX 9, 19). A copy of the findings were forwarded to Employer and the Fund (DX 19).[3]

On July 31, 2000, the Fund submitted a notice of controversion, stating that it contested all of the issues listed in the Notice of Initial Findings (DX 20). However, the OWCP argues that pursuant to 20 C.F.R. §725.413(3), such notice was untimely because it should have been received on or before February 19, 2000, within (30) thirty days after the January 19, 2000 notice of denial was sent (DX 45). The Fund, however, argues that it was first made aware of the pendency of the matter on July 28, 2000, when it received a copy of the Notice of Initial Findings and therefore, the controversion was timely. Additionally, the Fund maintains that a Notice of Claim should have been sent not only to Employer and the Fund but, to the Fund's *authorized representative* pursuant to the Department of Labor's Coal Mine (BLBA) Procedure Manual, Chapter 2-801, Paragraph 7, and *Tazco, Inc., v. Director, OWCP*, 895 F. 2d 949 (4th Cir. 1990).

The claim was then referred to the Office of the Administrative Law Judges on December 16, 2000. A formal hearing was scheduled for June 6, 2001, but was continued to May10, 2002, and remanded by order dated, May 29, 2001, for the development of responsible operator evidence (DX 37). The May 10, 2002 hearing was further continued and rescheduled to July 11, 2002.

On July 11, 2002, I held a formal hearing in Wheeling, West Virginia. At the conclusion of the hearing, post-hearing briefs were set to be due September 30, 2002, and Claimant was provided additional time to produce evidence which documented Employer as the responsible operator (Tr.26- 27). Thereafter, on July 29, 2002, Claimant submitted pay stubs which proved that he had worked for Employer in excess of one year. The Fund then stated that it no longer contested the responsible operator issue and would limit its post-hearing brief to the medical issues.

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according Claimant failed to show that his pneumoconiosis was caused by coal mine work and he did not prove that he was totally disabled (DX 28-14). The Office of the Administrative Law Judges subsequently denied the claim on the same grounds (DX 28-18).

[3] The Fund stated in its' post-hearing brief that it received a copy of the Notice of Initial Finding on Friday, July 28, 2000.

Employer and Claimant submitted post-hearing briefs. However, on August 9, 2002, the Office of the Solicitor sent a letter in lieu of a post motion brief, which stated that the Director continued to maintain that pursuant to 20 C.F.R. §725.413(b)(3), the Employer and the Fund waived their right to contest the above-captioned claim. According to the Director, they received notice of their liability in January of 2000, and did not contest such liability until July of 2000, more than (30) thirty days after the receipt of such notice.

Claimant's suit was certified by the Black Lung Disability Trust Fund and it was determined that his beginning date of entitlement was November 1, 1999 (DX 46). On approximately January 15, 2000, he began to receive payments from the Trust Fund.

I.Background

Claimant is 61 years old and has worked in West Virginia as a underground miner for approximately twenty-six years (Tr. 21, DX 28-1).[4] In 1965, he was employed by Imperial Smokeless Coal Company which was subsequently purchased by Westmoreland Coal Company (Tr. 14). Thereafter, Claimant worked for Westmoreland Coal Company until it was later acquired by Lady H. Coal Company, Inc., (hereinafter "Employer) where he began to work as an underground electrician and a mechanic (Tr. 8, 14, 21-22). Claimant testified that he continued to work throughout these acquisitions and the only aspect of his employment which changed was the amount of pay he received, as evidenced by his social security records (Tr. 15-16).

Claimant stated that as an electrician and a mechanic, he worked he from 12:00 p.m. to 8:00 p.m., five days per week, repairing and maintaining coal mining equipment (Tr. 9). He said that this work was strenuous, involved moving equipment weighing approximately 500 to 1000 pounds and crawling a few miles everyday while heavy tools were either connected to him or, he dragged the tools in front of him or behind him (Tr. 9, 19). He further stated that if there was an emergency in the mine, the miners were required to climb up a two-hundred to three-hundred foot ladder in order to escape (Tr. 10-11). Claimant then explained that he was no longer physically able to climb a ladder of this magnitude at a normal rate (Tr. 11).

Claimant testified that in 1987 he quit mining due to respiratory problems and sought treatment from Dr. Lenkey, his treating physician (DX 1, Tr. 12). He said that he has been treated by Dr. Lenkey for approximately four to five years, currently visits him several times per year and takes prescribed medication for this problem (Tr. 11). Claimant explained that because of shortness of breath, he is no longer able to hunt and does not believe that he is able to return to coal mines to work as a miner (Tr. 12). He further stated that his medical condition is progressively worse than it was two years ago (Tr. 12).

Claimant testified that has never smoked cigarettes, a pipe or a cigar (Tr. 13).

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[4] Therefore, the Fourth Circuit law governs this case. *Shupe v. Director* 12 B.L.R. 1-200, 1-202 (1989) (*en banc*).

Claimant was divorced on January 21, 1994, and currently has no dependents (DX 1).

II. Issues

(1) Whether the Fund's controversion to the Notice of Initial Finding, sent on July 31, 2000, was timely filed pursuant to 20 C.F.R.§725.413(3)?
(2) Whether there has been a material change of conditions as defined by §725.309 of the Act?
(3) Whether Claimant has established the existence of pneumoconiosis?
(4) Whether Claimant is totally disabled?
(5) Whether Claimant's pneumoconiosis arose out of coal mine employment?
(6) Whether Claimant's total disability is due to pneumoconiosis?

III. Whether the Fund's controversion to the Notice of Initial Finding, sent on July 31, 2000, was timely filed pursuant to 20 C.F.R. 725.413(3)

The Department of Labor's Coal Mine (BLBA) Procedure Manual at Chapter 2-801, Paragraph 7, requires that a Notice of Claim, the Operator's Response and copies of all evidence submitted for the claim, be sent by certified mail to the responsible operator and that "*the operator's insurance carrier, the claimant, and authorized representatives of any party should also be sent copies of the notification forms and evidence by certified mail*."

In addition, the Fourth Circuit has held that due process requires that a copy of the Notice of Initial Finding, be sent to an Employer *and* an Employer's insurance carrier. *Tazco, Inc. Director, OWCP*, 895 F.2d 949 (4th Cir. 1990).

I do not feel that the issue of whether the Fund *and* the Fund's authorized representative must be sent notice of the claim, needs to be addressed in this instance. Regardless of whether the Notice of the Claim was received by the Fund's representative, I find that the Fund's notice of controversion was timely sent because the Notice of the Claim sent on December 10, 1999, stated it pertinent part:

> If it should be determined that the claimant is entitled to benefits and that if you are the responsible operator, *you shall have (30) thirty days from the date of the district director's* ***notice of initial finding*** *of eligibility on which to accept or contest such findings* and to submit any available evidence not previously submitted to the director (Section 725.414(b) of Title 20 of the Code of Federal Regulations).

(DX 6).

As a result, the controversion did not have to be submitted until (30) days after the *Notice of Initial Finding* was sent.

Furthermore, on July 24, 2000, the Fund's authorized representative received the Notice of Initial Finding which stated:

> If you wish to contest the initial finding, *you must file a controversion (CM - 970) with this office within (30) days of the date of this notice.* The record will remain open for an additional period of (30) days unless extended for good cause by the District Director, for the submission of additional evidence, including examination of the claimant by a physician of your choice.
> *If you fail to respond within (30) days, you will be deemed to have accepted the initial finding, and this failure shall be considered a waiver of your right* to contest this claim unless good cause is shown to excuse such failure (20 C.F.R. 725.413).

Because the Notice of Initial Findings stated that Employer had thirty days to contest the claim and Employer's insurer's representative received such notice on Friday, July 28, 2000, I find that Employer had thirty days thereafter in order to file its' controversion. Furthermore, given the fact that Employer sent the controversion on July 31, 2000, I find that the notice was filed well within the thirty day time period.

In addition, I find that the copy of the denial of the claim sent to Employer and the Fund did not constitute notice. The denial of the claim letter sent on January 19, 2000, did not state that liability must be controverted within a specific time period (DX 9). It merely stated that Claimant had not produced sufficient evidence to establish a material change of conditions since his prior denial, that he could submit additional evidence to show a material change and that he could request a hearing before an Administrative Law Judge (DX 9). Also, this document stated that if the operator contested the claim, he would be able to submit evidence within the time limits provided in the "Notice of Finding" and if the operator was found to be liable, he would be ordered to pay benefits within 30 days (DX 9).

Due to the foregoing, I find that the Fund timely filed its' controversion pursuant to 20 C.F.R. §725.413(3).

IV. Responsible Operator

As previously stated, after the conclusion of the hearing, Claimant provided this Court with pay stubs which proved that he had worked for Employer in excess of one year. Furthermore, the Fund by letter dated, August 2, 2002, stated that it no longer contested the responsible operator issue. I therefore find that Lady H. Coal Company Inc., is the responsible operator pursuant to 20 C.F.R. §725.492 and §725.493.

V. Material Change of Conditions- §725.309

Claimant must prove that a material change of conditions has occurred since the prior denial of his 1997 claim. 20 C.F.R.§725.309. If however, the newly submitted evidence does not demonstrate a material change of conditions, his current claim will be denied on the same grounds as his prior claim. 20 C.F.R. §725.309.

In order to establish a material change of conditions, Claimant must show at least one of the following "elements of entitlement" by a preponderance of the evidence developed since the denial of his prior claim: (1) he has pneumoconiosis; (2) the pneumoconiosis arose out of coal mine employment; (3) he is totally disabled; and (4) the pneumoconiosis contributes to the Claimant's total disability §725.202(d)(2); *Allen v. Mead Corp.*, 22 B.L.R. 1-61 (2000).

In *Lisa Lee Mines v. Director, OWCP*, 57 F. 3d 402 (1995), aff'd., 86 F. 3d 1358 (4th Cir. 1996)(en banc), *cert. denied*, 117 S.Ct. 763 (1997), the Fourth Circuit adopted the material change of conditions standard set forth in *Sharondale Corp. v. Ross*, 42 F. 3d 993 (6th Cir. 1994) which requires the ALJ to consider all of the favorable and unfavorable evidence in order to determine whether the claimant has proven at least one of the elements previously adjudicated against him. However, the Fourth Circuit declined to adopt the Sixth Circuits's additional requirement, that the evidence from the prior denial must be analyzed in order to access whether it differs "qualitatively" from the newly submitted evidence.

Claimant's 1997 claim was denied because he failed to prove that his pneumoconiosis was caused by coal mine employment and he did not show that he was totally disabled due to the disease (DX 28-14, 28-18). As discussed below, since the denial of the 1997 claim, Claimant has produced medical opinion evidence which established that he is totally disabled and evidence that his pneumoconiosis was caused by coal mine employment. Therefore, I find that Claimant has met this threshold requirement of proving a material change of conditions since his prior denial.

VI. Pneumoconiosis

In establishing entitlement to benefits, Claimant must show the existence of pneumoconiosis by a preponderance of the evidence, through the use of chest x-ray evidence or well reasoned and documented physician opinion evidence. *Director v. Greenwich Collieries*, 512 U.S. 267 (1994); §718. 202; *See Generally* §718(a)(4).

Claimant has provided sufficient evidence, clearly establishing this element. Below is a summary of Claimant's chest x-ray evidence beginning with the most recent readings.

Exhibit	Date of Chest x-ray	Physician/ Radiological Qualifications [5]	Reading
DX 23	09-05-00	Dr. Renn, B,	1/1
DX 34	02-24-00	Dr. Spitz, B, BC	1/1
DX 33	02-24-00	Dr. Wiot, B, BC	1/1
DX 18	02-24-00	Dr. Sargent, B, BC	No CWP
DX 16, 17	02-24-00	Dr. Noble, B, BC	1/1, "A" opacities
DX 4	08-30-99	Dr. Gaziano, B,	1/1
DX 3	08-30-99	Dr. Altmeyer, Unknown.	1/1
DX 28	01-22-98	Dr. Gaziano, B	1/1
DX 28	01-22-98	Dr. Sargent, B, BC	No CWP
DX 28	01-22-98	Dr. Yost , B, BC	1/1
DX 3, 28	10-30-96	Dr. Kennard, Unknown	1/1
DX 27	09-09-80	Dr. Gordonson, B, BC	1/1

[5] Board-certified means certified in radiology or diagnostic roentgenology by the American Board of Radiology, Inc., or the American Osteopathic Association. A "B"reader is a radiologist or other physician who has demonstrated his proficiency in assessing and classifying x-ray evidence of pneumoconiosis by successful completion of an examination conducted by or on behalf of the Department of Health and Human Services. BD, Eligible stands for "Board-eligible radiologists" who are entitled to receive less weight than a board-certified radiologist. Board-eligible physicians have successfully completed a formal accredited redency program in radiology or diagnostic roentgenology. 20 C.F.R. 718.202(a)(1)(iii).

DX 27	09-09-80	Not Legible, BD, Eligible	Negative
DX 27	05-29-73	Dr. Scott, Unknown.	0/0

The Board has held that it is within the administrative law judge's discretion to consider the numerical superiority of the x-ray evidence. *Edmiston v. F&R Coal Co.*, 14 B.L.R. 1-65 (1990). In this instance, Claimant had seven chest x-rays taken from 1973 to 2000, which were interpreted on fourteen different occasions by various physicians. In sum, ten out of fourteen physicians concluded that Claimant had pneumoconiosis. Thus, I find that the overwhelming majority of the x-rays taken established pneumoconiosis.

Claimant's older chest x-rays in taken 1973, 1980 and 1998, were read by three physicians as negative for pneumoconiosis. However, the Fourth Circuit in *Adkins v. Director, OWCP*, 958 F.2d 49,52 (4th Cir. 1992), stated that the "[c]onflicts between x-rays should then be weighed in context to determine whether there is pneumoconiosis." When weighing x-ray evidence, the ALJ may proportion more weight to the most recent chest x-ray evidence because pneumoconiosis is a progressive disease,. *Clark v. Karst-Robbins Coal Co.*, 12 B.L.R. 1-149 (1989) (en banc); *Tolascik v. Consolidation Coal Co.*, 6 B.L.R. 1-666 (1983). In this instance, these three x-ray readings were conducted before Claimant filed this present1999 claim. Furthermore, from 1999 to 2000, only one physician, Dr. Sargent, out of six physicians, formed the opinion that Claimant did not have this disease. Moreover, Dr. Noble, who read the February 24, 2000 x-ray, stated that Claimant had "A opacities" which is an indication that he may have complicated pneumoconiosis, an extremely advanced stage of the lung disease. I am therefore giving more weight to the more recent readings.

In addition, it has been held that the ALJ must proportion proper weight to each x-ray according to the reading physician's particular background and qualifications by giving more deference to the opinions of the qualified readers. *Roberts v. Bethlehem Mines Corp.* 8 B.L.R. 1-211 (1985). The Board stated that more weight may be given to the interpretation of a duly qualified physician (a Board-certified physician) over the interpretation of a B-reader. *Crandor v. Peabody Coal Co.*, 22 B.L.R. 1-1 (1999) *(en banc on recon.); Sheckler v. Clinchfield Coal Co.*, 7 B.L.R. 1-128 (1984). In this instance, Claimant's two x-rays taken in 2000, which I have afforded more weight, were read by five different physicians. Three of the physicians who determined that Claimant had pneumoconiosis were Board-certified and B-readers and the fourth physician who found pneumoconiosis was a B-reader. Only one physician, Dr. Sargent, a Board-certified and a B-reader physician, concluded that Claimant did not have pneumoconiosis. In sum, three Board-certified and B-reader physicians determined that Claimant had pneumoconiosis, one B-reader found pneumoconiosis and only one Board certified physician found that there was no presence of pneumoconiosis. Thus, the great weight of duly qualified physicians concluded that Clamant had pneumoconiosis.

Claimant's 1999 x-ray was interpreted by two physicians as positive for pneumoconiosis. Although one of these physicians was a B-reader and not Board-certified, and other physician's qualifications are unknown, these readings are not contradicted by any other physician's determination.[6]

Claimant's 1998 x-ray was examined by three physicians. Two physicians, Dr. Yost, and Dr. Sargent, were both Board-certified and B-readers. Dr. Yost determined that Claimant had pneumoconiosis, whereas, Dr. Sargent concluded that he did not have pneumoconiosis. However, a third physician, Dr. Gaziano, a B-reader, also read this x-ray as positive. Thus, the majority of duly qualified physicians found the existence of pneumoconiosis in the 1998 x-ray.

Because the majority of the physicians determined that Claimant had pneumoconiosis and a larger proportion of the more recent x-ray readings established pneumoconiosis were read by duly qualified physicians, I find that Claimant's chest x-rays show by a preponderance of the evidence, the element of pneumoconiosis.

In addition, I find that pneumoconiosis has been established by the use of well reasoned and documented physician opinion pursuant to Section 718(a)(4) of the Act. A reasoned and well documented opinion is an opinion based on physical examinations, symptoms, the patient's work and social histories and the underlying data is sufficient to support the physician's determination. *Hoffman v. B&G Construction Co.*, 8 B.L.R. 1-65 (1985); *Hess v. Clinchfield Coal Co.*, 7 B.L.R. 1-295 (1984); *Fields v. Island Creek Coal Co.*, 10 B.L.R. 1-19 (1987). However, undocumented and unreasoned opinion may be given little or no weight. *Clark v. Karst-Robbins Coal Co.*, 12 B.L.R. 1-149 (1989) (en banc). Furthermore, the ALJ may reject a physician's report when the basis of the physician's opinion can not be determined. *Cosaltar v. Mathies Coal Co.*, 6 B.L.R. 1-1182 (1984).

Five well documented and reasoned physicians' opinions diagnosed Claimant with pneumoconiosis. Below is a summary of these opinions.

(1.) Dr. Attila L. Lenkey's October 30, 1996 Medical Opinion (DX3):

Dr. Lenkey, M.D., F.C.C.P., concluded that Claimant had "coal worker's pneumoconiosis, based upon physical examination of Claimant, his past medical history, family history, occupational history and clinical test results. After acknowledging that Claimant had worked in the coal mines and was exposed to coal dust, he explained:

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[6] It is improper to accord greater weight to the interpretation of a physician whose qualifications are unknown. *Stanley v. Director OWCP*, 7 B.L.R. 1-386 (1984). The party seeking to rely on an x-ray interpretation bears the burden of establishing the qualifications of the reader. *Rankin v. Keystone Coal Mining Co.*, 8 B.L.R. 1-54 (1985).

> The patient appears to have significant pulmonary physiologic impairment with noted obstruction. The patient is purportedly a life long nonsmoker. He also has a markedly abnormal chest x-ray with tendency towards confluency on the right. ...Based on the patient's physiologic testing he has a 50% impairment.

(2.) The Department of Labor's February 5, 1998 Medical Examination Results - Dr. Attila L. Lenkey (DX 28-6)

Dr. Lenkey preformed a medical examination on Claimant and reviewed his relevant occupational history, medical history, social history, clinical test results and family history. He formed the opinion that Claimant had pneumoconiosis due to exposure to coal dust and explained that he had a 30% impairment due to this disease.

(3.) Dr. *Attila L. Lenkey's August 8, 1999 Medical Opinion (DX3)*:

Dr. Lenkey preformed a physical examination on Claimant and reviewed his past medical history, social history, occupational history and clinical test results. He stated that Claimant had worked in the mines and was exposed to coal dust. Also, Dr. Lenkey observed that the chest x-rays showed "old granulomatous disease in the upper lobes as well as some opacities, category R, 1/1 in both upper lung zones." Furthermore according to Dr. Lenkey:

> The patient shows evidence for marked pulmonary physiologic impairment with an abnormal chest x-ray and abnormal pulmonary function tests with a slight decrease of oxygenation. Based on the given information, it would appear that this gentleman has significant pulmonary physiologic impairment attributable to long standing coal dust exposure. ...CONCLUSION: Coal workers' pneumoconiosis with 100% impairment.

(4.) The Department of Labor's July 6, 2000 Medical Examination Results - Dr. Attila L. Lenkey (DX 14)

Dr. Lenkey listed Claimant's prior mining experience, family history, medical history and clinical test results. He stated that Claimant complained of being short of breath and unable to physically exert himself. After physical examination of Claimant, he diagnosed him with "CWP" caused by "coal dust". In addition, Dr. Lenkey concluded that Claimant was 100% impaired and thus, he was not able to perform his last coal mine employment. Furthermore, he found that the extent in which Claimant's diagnosis of pneumoconiosis contributed to his current impairment was "total".

(5.) Dr. Joseph J. Renn, III's October 9, 2000 Medical Opinion (DX 23).

Dr. Renn discussed Claimant's occupational history, medical history, social history, clinical test results and family history. He stated that he conducted a physical examination on Claimant and concluded that Claimant had simple "coal workers' pneumoconiosis" and "mild obstructive ventilatory defect." Furthermore, he formed the opinion that "[i]t is with a reasonable degree of medical certainty that Mr. Jesse Townsend's simple coal workers' pneumoconiosis did result from his exposure to coal dust." However, according to Dr. Renn, Claimant's mild obstructive ventilatory impairment is "not of sufficient degree to prevent him from being able to perform either his next-to last known coal mining job ...or his last coal mining job of electrician/ mechanic or any other similar work effort." Dr. Renn concluded that within a reasonable degree of medical certainty, Claimant was not totally disabled.

Dr. Renn, is a certified B-reader and a Pulmonary Disease Consultant. From 1975 to 1988, he was the Chief of Pulmonary Function Laboratory and Medical Director of Respiratory Therapy at Monongalia General Hospital.

After a careful examination of the entire record, I find that Claimant has established the element of pneumoconiosis based on the quantity and quality of the chest x-ray evidence and a majority of reasoned and documented physician opinion evidence. Furthermore, I am attributing less weight to the medical opinion of Dr. Renn III. because it is it it is inconsistent and outnumbered by the abovementioned qualified physicians' x-ray findings. In addition, Dr. Renn's determination is contrary to the opinion of Claimant's treating physician, Dr. Attila L. Lenkey.

VI. Pneumoconiosis Arising Out of Coal Mine Employment

In order to be eligible for benefits under the Act, a claimant must prove that his pneumoconiosis arose, at least in part, out of his coal mine employment. § 410.410(a). If the claimant proves that he has worked in the coal mines for more than ten years, it is presumed that the pneumoconiosis arose out of such employment. However, an employer may rebut this presumption by producing a medical report finding(s) which concludes that the pneumoconiosis was caused by something other than coal mine dust exposure. 20 C.F.R. §727.203(a) ; *Smith v. Director* 12 B.L.R. 1-156 (1989).

Claimant worked in the coal mines for approximately (26) twenty-six years and is therefore, as a matter of law, entitled to the benefit of the §727.203(a) presumption (DX 28-1). Furthermore, Employer has not produced medical evidence which established that Claimant's pneumoconiosis was caused by anything other than coal dust exposure. On the contrary, Employer's medical opinion written by Dr. Renn, stated "[i]t is with a reasonable degree of medical certainty that Mr. Jesse Townsend's simple coal workers' pneumoconiosis did result from his exposure to coal dust." (DX 23). Thus, I find that Claimant has also established this second

element of entitlement.

VI. Total Disability

To establish this third element of entitlement, a claimant must show that he is currently unable to preform the type of mining work he previously engaged in, on a regular basis and over a substantial period of time and that his impairment was predicted to lead to death or last longer than twelve months. C.F.R. §410.412(a)(2). Evidence of cor pulmonale with right-sided congestive heart failure, pulmonary function study evidence, arterial blood gas studies or medical opinion evidence are the alternative methods available to the claimant to prove total disability. §718.204(b)(2)(i)-(iv); *Sheldlock v. Bethlehem Mines Corp.*, 9 B.L.R. 1-195 (1986).

The record contains no diagnosis of cor pulmonale with right-sided congestive heart failure. This method of establishing total disability is therefore inapplicable.

In addition, the pulmonary function study and arterial blood gas study evidence illustrated below, produced non-qualifying values. Thus, Claimant can not establish total disability pursuant to §718.204(b)(2)(i)-(iii).

(1) Pulmonary Function Tests

Director's Exhibit Number	Date	Age	Height	FEV1	MVV	FVC	FEV1/ FEVC	Regulatory Standards
DX 27	09-09-80	39	69"	3.2	85.2	-		
DX 28	01-22-98	56	68"	2.42	73	4.0	60.5%	< 1.97
DX 3	08-30-99	58	68"	2.34	81	4.13	56.6%	< 1.94
DX 12	02-24-00	59	69"	1.36	66	3.01	45%	< 1.98
DX 23	09-23-80	59	67.5"	2.34	81	4.27	54.8%	< 1.89

(2) Arterial Blood Gas Studies

Director's Exhibit Number	Date	PCO2	PO2	Disability Standard for PO2
3	0-30-99	34.9	69.2	< 65%[7]

[7] Claimant's PO2 must be less than or equal to 65% pursuant to §718.204(c)(2) and §718.305(a) and (c). These sections create a presumption that the Claimant is totally disabled if

15	02-24-00	36.6	70	< 64%
23	09-05-00	34.7	79	< 65%
27	09-09-80	36	67	< 64%
28	01-22-98	35	88	< 65%
		36.1	83.8	< 63%

As previously stated, however, a claimant may also demonstrate total disability under Section 718.204(b)(2)(iv) by submitting physician opinion evidence which concludes that his present medical condition prevents him from preforming coal mine or similar work based on medically acceptable clinical or laboratory test results.

Here, Claimant offered four medical opinions to establish this element. The first opinion was written by Dr. Attila Lenkey, dated, October 30, 1996, acknowledged that Claimant had worked in the coal mines and was exposed to coal dust, and explained that "[b]ased on the patient's physiologic testing he has a 50% impairment" (DX3). Next, the Department of Labor's February 5, 1998, medical examination results, written by Dr. Attila L. Lenkey, was submitted. Dr. Lenkey concluded that Claimant had pneumoconiosis due to exposure to coal dust and a 30% impairment due to such disease (DX 14). Thereafter, Claimant offered the opinion of Dr. Attila L. Lenkey, dated August 8, 1999, finding the Claimant totally disabled by coal workers' pneumoconiosis and 100% impaired (DX 3).

Finally, the Department of Labor's July 6, 2000 medical examination results, written by Dr. Lenkey, were submitted (DX 14). Dr. Lenkey stated that Claimant complained of being short of breath and unable to physically exert himself. Furthermore, he concluded that Claimant was 100% impaired and unable to perform his last coal mine employment. Moreover, he found that the extent in which Claimant's diagnosis of pneumoconiosis contributed to his current impairment was "total".

To rebut the element of total disability, Employer produced the medical opinion of Dr. Joseph J. Renn, III. dated, October 9, 2000 (DX 23). Dr. Renn formed the opinion that Claimant's mild obstructive ventilatory impairment is "not of sufficient degree to prevent him from being able to perform either his next-to last known coal mining job ...or his last coal mining job of electrician/ mechanic or any other similar work effort." He then concluded that within a reasonable degree of medical certainty, Claimant was not totally disabled (DX 23).

More weight may be afforded to the diagnosis of a treating physician because he or she is more likely to be familiarized with the condition of the miner than a physician who has examined the claimant sporadically. *Onderko v. Director, OWCP*, 14 B.L.R. 1-2 (1989). Moreover, in

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his or her test results meet these specific statutory levels.

Adkins v. Director, OWCP, 958 F.2d 49 (4th Cir. 1992), the Fourth Circuit noted that it was important to conduct multiple examinations over a period of time because "a comparison of medical reports and tests over a long period of time may conceivably provide a physician with a better prospective than the pioneer physician."

In this instance, after personally examining Claimant, two, equally qualified physicians submitted well reasoned and documented medical opinions into evidence. In sum, one physician determined that Claimant was totally disabled and the other concluded that Claimant was still able to perform his last coal mining job. Although Employer has produced the opinion letter of Dr. Renn, stating that Claimant was not totally disabled, Claimant has submitted four opinions written by his treating physician, Dr. Lenkey, which documented the decline of Claimant's condition over time. In 1996, Dr. Lenkey stated that Claimant's respiratory condition caused him a was 50% impairment and in 1998, a 30% impairment. Thereafter, in 1999 and in 2000, Dr. Lenkey formed the opinion that Claimant was 100% impaired. The evidence further illustrated that Claimant has been treated by Dr. Lenkey for approximately four to five years and has been examined by him on multiple occasions (Tr. 11). Thus, I am giving more weight to the opinion of Dr. Lenkey, Claimant's treating doctor. In addition, I find the opinion of Dr. Lenkey to more credible than that of Dr. Renn III because Dr. Lenkey's evidence is consistent with Claimant's testimony explaining that his medical condition is progressively worse than it was two years ago (Tr. 12). Thus, find that Claimant has established that he is totally disabled by a preponderance of the evidence.

VII. Pneumoconiosis Contributes to Total Disability

Total Disability due to pneumoconiosis is established if well documented and reasoned physician opinion evidence demonstrates that pneumoconiosis is a substantially contributing cause to the miner's totally disabling respiratory or pulmonary condition disability. §718.204(c)(1) and (2); *Lollar v. Alabama By Products Corp.*, 893 F. 2d 1258 (11th Cir. 1990).

Here, Dr. Lenkey's well documented and reasoned physician opinions provided substantial evidence that Claimant's total disability was contributed to by pneumoconiosis. As discussed above, in the four medical opinions he submitted, he acknowledged that Claimant was a "lifelong nonsmoker", was exposed to coal dust from working in the mines and diagnosed Claimant with "coal workers' pneumoconiosis" attributable to "coal dust" (DX 3, 28-6, 14). Moreover, on August 8, 1999, he explained that "[b]ased on the given information (Claimant's occupational history, social history, clinical tests and personal examination of Claimant), it would appear that this gentleman has significant pulmonary physiologic impairment attributable to long standing coal dust exposure (DX 3).

Furthermore, Employer did not produce evidence proving that Claimant's present disability was caused by anything other than coal dust exposure. In contrast, Employer's medical expert Dr. Renn, III, stated that "[i]t is with a reasonable degree of medical certainty that Mr. Jesse Townsend's simple coal workers' pneumoconiosis did result from his exposure to coal

dust."

Given the fact that Claimant's medical opinion evidence established that the pneumoconiosis was caused by exposure to coal dust and Employer's lack of substantial evidence on this issue, I find that Claimant's pneumoconiosis contributed to his total disability.

VIII. Summary

Claimant has proved by a preponderance of the evidence the requisite elements of entitlement at §725.202(d)(2). He has shown that he has pneumoconiosis, this pneumoconiosis arose out of his coal mine employment, he is totally disabled and his pneumoconiosis contributed to his total disability. Claimant is therefore entitled to benefits.

IX. Onset of Benefits

Pursuant to §725.503(d)(2), Claimant is entitled to receive benefits the month of the onset of the total disability due to pneumoconiosis but, in situations where the evidence does not establish the date of this onset, his benefits shall commence the date he filed this third claim. After review of the evidence contained in the record, I can not make a finding of the onset of total disability. Therefore, Claimant is entitled to receive benefits commencing on November 19, 1999, the beginning of the month in which he filed this claim.

X. Attorney Fee

Because no application for approval of attorney fees has been submitted to this Court, thirty days is hereby allowed to Claimant's counsel to do so. The application must contain a service sheet which shows that all parties have been served, including Claimant. Thereafter, pursuant to §725.365 and §725.366 of the Act, parties have ten days following receipt of the application to file objections.

ORDER

The Claim for Mr. Jesse G. Townsend for black lung benefits under the Act is GRANTED.

It is hereby ORDERED that Lady H. Coal Company, Inc., shall pay Claimant Jesse G. Townsend benefits pursuant to the Act commencing on November 19, 1999.

A

GERALD M. TIERNEY
Administrative Law Judge